

**E-FILED on** 2/28/06

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

COALITION FOR ICANN TRANSPARENCY  
INC, a Delaware corporation,

Plaintiff,

v.

VERISIGN, INC., a Delaware corporation;  
INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS, a  
California corporation,

Defendants.

No. C-05-04826 RMW

ORDER DENYING VERISIGN'S MOTION  
TO DISMISS AND GRANTING  
DEFENDANTS' MOTIONS FOR  
JUDGMENT ON THE PLEADINGS

**[Re Docket No. 63, 66, 74]**

On November 28, 2005 the Coalition For ICANN Transparency, Inc. ("CFIT") sued VeriSign, Inc. ("VeriSign") and the Internet Corporation for Assigned Names and Numbers ("ICANN") (collectively "defendants") for antitrust violations, unfair competition, cybersquatting, and intentional interference with prospective economic advantage. CFIT filed a motion for a Temporary Restraining Order ("TRO"). On November 30, 2005 this court denied CFIT's motion. The court noted that it would construe the motion as a request for a preliminary injunction if CFIT desired and set a briefing schedule. On January 17, 2006 CFIT withdrew its motion. VeriSign now moves to dismiss CFIT's complaint for improper venue. In addition, both defendants seek judgment

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1 on the pleadings. The court has read the moving and responding papers and considered counsels'  
 2 arguments. For the reasons set forth below, the court denies VeriSign's motion to dismiss and grants  
 3 defendants' motions for judgment on the pleadings with leave to amend.

#### 4 **I. BACKGROUND**

5 CFIT is a nonprofit membership organization whose members "include certain Internet  
 6 domain registrars, registrants, back order service providers, and other Internet stakeholders."  
 7 Complaint ("Comp.") ¶ 7. CFIT alleges that every computer connected to the Internet has a unique  
 8 Internet Protocol ("IP") address. *Id.* at ¶ 15. IP addresses are long strings of numbers, such as  
 9 64.233.161.147. *Id.* The Internet domain name system ("DNS") provides an alphanumeric  
 10 shorthand for IP addresses. *Id.* at ¶ 16. For example, the IP address 64.233.161.147 is commonly  
 11 known by its domain name: google.com. *Id.* The portion of the domain name to the right of the  
 12 period is the top-level domain ("TLD"). TLDs include .com, .gov, .net., and .biz. *Id.* at ¶ 17. The  
 13 .com and .net TLDs are "dominant" in the United States and of paramount importance for many  
 14 businesses. *Id.* at ¶¶ 6, 20, 25. Second-level domain names are to the left of the TLDs, such as  
 15 "google" in "google.com." *Id.* Each domain name is unique and thus can only be registered to one  
 16 entity. *Id.* at ¶ 18. Thus, recognizable domain names are a finite resource. *Id.* at ¶ 25. To ensure  
 17 that each domain name refers to the appropriate IP address, each TLD has a single "registry" that  
 18 links the two. *Id.* at ¶ 19.

19 ICANN is a private not-for-profit corporation that coordinates the DNS on behalf of the  
 20 United States Department of Commerce ("DOC"). *Id.* at ¶¶ 1, 5, 27. ICANN's bylaws provide that  
 21 it shall "[i]ntroduc[e] and promot[e] competition in the registration of domain names where  
 22 practicable and beneficial in the public interest." *Id.* at ¶ 29. ICANN operates under a  
 23 Memorandum of Understanding ("MOU") with the DOC. *Id.* at ¶ 27. The MOU "is effectively  
 24 ICANN's charter." *Id.* The MOU's purpose is to "promote[ ] the management of the DNS in a  
 25 manner that will permit market mechanisms to support competition and consumer choice in the  
 26 technical management of the DNS." *Id.* The MOU prohibits ICANN from "unjustifiably or  
 27 arbitrarily" injuring "particular persons or entities or particular categories of persons or entities." *Id.*

1 It requires ICANN to "act in a non-arbitrary and reasonable manner with respect to . . . any . . .  
2 activity related to a DNS project." *Id.* The original MOU was scheduled to expire in September  
3 2000. *Id.* ICANN and the DOC have amended it six times. *Id.* The most recent amendment  
4 reiterates the DOC's "policy goal of privatizing the technical management of the DNS in a manner  
5 that promotes stability and security, competition, coordination, and representation." *Id.* In this  
6 amendment, ICANN also reaffirms its "commitment to maintaining security and stability in the  
7 technical management of DNS, and to perform as an organization founded on the principles of  
8 competition, bottom up coordination, and representation." *Id.*

9 ICANN has contracted with VeriSign to serve as the registry for all .com and .net domain  
10 names. Consumers, or "registrants," sign up for domain names, causing VeriSign's database to relate  
11 the domain name with the specific IP address. *Id.* at ¶¶ 19, 21. Registrants do not have direct access  
12 to this database. *Id.* at ¶ 21. Instead, prospective registrants use "registrars" to handle the technical  
13 details. *Id.* This process is automated. *Id.* at ¶ 22. VeriSign grants a limited number of connections  
14 to its registry computers. *Id.* A registrar sends an "add" command to the registry. *Id.* If the name is  
15 available, the registrar acquires the name on behalf of the registrant. *Id.* When a popular domain  
16 name expires, registrars send rapid-fire "add" commands to try to register the name. *Id.* at ¶ 23.  
17 Because the system is based on chance, and because a registrar's odds of registering an expired  
18 domain name increase with the number of "add" commands it sends, it "functions, in essence, like a  
19 lottery." *Id.* "[J]ust as buying more tickets in a lottery increases the chance of winning, lining up  
20 more registrars to participate in the domain name lottery on behalf of a registrant increases the  
21 chance of success." *Id.* at ¶ 64.

22 Accordingly, this regime spawned a new business: "back order service providers." Back  
23 order service providers are companies that combine forces with several registrars in order to increase  
24 the odds of winning the domain name registration lottery. *Id.* at ¶ 24. A registrar receives an order  
25 from a client and hires a back order service provider to pool the resources of several registrars. *Id.*  
26 If the back order service provider is successful, it and its partner-registrars "all share appropriately in  
27 the registration fee charged to the client." *Id.* The back order service business is "robust and  
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1 competitive," with hundreds of registrars generating millions of dollars in revenue. *Id.* at ¶ 26.  
2 Without back order service, the cost to register a new or previously-released name is between \$6.95  
3 and \$7.50. *Id.* VeriSign and ICANN collect \$6.25 (\$6.00 to VeriSign and \$0.25 to ICANN) for  
4 registration of each .com domain name and \$4.25 (\$3.50 to VeriSign and \$0.75 to ICANN) for each  
5 .net domain name. *Id.* The registrar keeps the balance. *Id.* However, a valuable domain name is  
6 likely to be registered through a back order service provider. *Id.* The price of back order service is  
7 generally around \$60. *Id.* Of this, VeriSign collects \$6.00 for the registry fee for .com domain  
8 names and \$4.25 for .net domain names. *Id.* The back order service provider generally retains about  
9 half of the remaining sum and splits the other half among its registrar partners. *Id.*

10 Two contracts govern ICANN and VeriSign's relationship: the .com Registry Agreement and  
11 the .net Registry Agreement. ICANN and VeriSign initially signed these agreements on May 25,  
12 2001 ("the 2001 Agreements"). *Id.* at ¶ 31. Both 2001 Agreements require VeriSign to provide  
13 "Registry Services" to ICANN-accredited registrars "in a manner meeting certain performance and  
14 functional specifications." *Id.* at ¶ 34. "Registry Services" is a defined term. *Id.* VeriSign also  
15 must comply with "Consensus Policies": rules established by certain Internet stakeholders. *Id.* at ¶  
16 35. Appendix G to both Agreements caps the prices VeriSign can charge for its services. *Id.* at ¶  
17 36. Under Appendix G, VeriSign can charge no more than \$6 per year for registration or renewal of  
18 a domain name. *Id.* In addition, it calls for a "registry-level transaction fee" payment of \$0.25 to  
19 ICANN for each domain name registration. *Id.* Appendix I to both Agreements includes a Code of  
20 Conduct that tasks VeriSign with "at all times striv[ing] to operate as a trusted and neutral third-  
21 party provider of Registry Services." *Id.* The Code of Conduct also forbids VeriSign from  
22 "warehousing or registering domain names in its own right other than through an ICANN-accredited  
23 registrar." *Id.* Appendix W to both Agreements provides that VeriSign will spend \$200,000,000  
24 "for research, development, and infrastructure improvements to the .com, .net, and .org Registries"  
25 between 2001 and 2010. *Id.* at ¶ 38. Finally, both Agreements prohibit VeriSign from  
26 "unreasonably retrain[ing] competition." *Id.*

1 The 2001 .com Agreement is scheduled to expire on November 10, 2007, but allows  
2 VeriSign to submit a written extension proposal between November 10, 2005 and May 10, 2006. *Id.*  
3 at ¶ 32. ICANN must consider this proposal for no more than six months "before deciding whether  
4 to call for competing proposals . . . ." *Id.* VeriSign "shall be awarded a four-year renewal term,"  
5 expiring on November 10, 2011, unless ICANN determines that VeriSign has materially breached  
6 the 2001 .com Agreement or the proposal's prices are too high. *Id.* According to CFIT, ICANN  
7 believes that VeriSign has materially breached the 2001 .com Agreement. In addition, VeriSign's  
8 current proposal to renew the 2001 .com Agreement contains excessive prices. *Id.* Thus, if ICANN  
9 wishes, it can "require competitive bidding for operation of the .com registry in 2007." *Id.*

10 Instead, however, defendants intend to replace the 2001 .com Agreement with the 2005 .com  
11 Agreement. *Id.* at ¶ 40. On October 24, 2005 defendants agreed to submit the 2005 .com  
12 Agreement for public comment and approval by ICANN's Board of Directors. *Id.* at ¶ 41. The  
13 Board was scheduled to vote at an ICANN meeting between November 30, 2005 and December 4,  
14 2005. *Id.* The initial expiration of the 2005 .com Agreement is November 30, 2012. *Id.* at ¶ 42. It  
15 will be renewed thereafter unless an arbitrator or court has issued a final ruling stating that VeriSign  
16 has materially breached its obligations under the contract. *Id.* It increases the maximum price for  
17 domain name registration. *Id.* at ¶ 43. Until December 31, 2006 the maximum price is \$6.00. *Id.*  
18 Beginning in 2007, it increases by seven percent each year. *Id.* In addition, the 2005 .com  
19 Agreement defines maximum price so that it does not include "registry-level transaction fees." *Id.* at  
20 ¶ 44. Thus, a registrar would pay these fees in addition to VeriSign's fee. *Id.* The "registry-level  
21 transactions fees" also increase over time, thus "allow[ing] ICANN to share in the monopoly profit  
22 generated by . . . the 2005 .com Agreement." *Id.*

23 The 2005 .com Agreement allows VeriSign "to use commercially valuable traffic data for its  
24 own commercial benefit, including promoting the sale of domain names." *Id.* at ¶ 45. It defines  
25 "Registry Services" in a manner that permits VeriSign to exclude certain tasks from the maximum  
26 price provisions. *Id.* at ¶ 46. Appendix 9 to the Agreement allows VeriSign "to offer many services  
27 in markets that are downstream and adjacent to the [DNS] market." *Id.* at ¶ 48. ICANN previously  
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1 opposed these services under the 2001 .com Agreement unless they were approved through the  
2 Consensus Policy. *Id.* One such service is the "Wait List Service," which ICANN viewed as a  
3 breach of the 2001 .com Agreement. *Id.* at ¶ 49. VeriSign intends to launch a modified version of  
4 the Wait List Service, which it has renamed the Central Listing Service ("CLS"). *Id.* The CLS  
5 overhauls the domain name registration system. *Id.* Under the current regime, when a registrant  
6 does not renew a domain name, VeriSign provides a forty-five day grace period before releasing the  
7 name. *Id.* By contrast, under the CLS, VeriSign will immediately conduct an auction for expired  
8 names among all registrars who have signed a CLS service agreement. *Id.* at ¶ 50. VeriSign will  
9 receive ten percent of the auction price. *Id.* In addition, while the 2001 .com Agreement allows  
10 registrants to "return" domain names within five days of acquiring them, the 2005 .com Agreement  
11 provides no such guarantee. *Id.* The 2005 .com Agreement also defines Consensus Policies  
12 differently and eliminates (1) the provision in the 2001 .com Agreement that requires VeriSign to  
13 spend \$200,000,000 for research and development and (2) the Code of Conduct. *Id.* at ¶¶ 52-54.

14 ICANN and VeriSign signed the 2005 .net Agreement, on June 29, 2005. *Id.* at ¶ 56. The  
15 2005 .net Agreement shares many provisions with the 2005 .com Agreement, including the  
16 automatic renewal procedure. *Id.* at ¶¶ 57, 58. It also eliminates the 2001 .net Agreement's price  
17 controls and raises the registry-level transaction fee." *Id.* at ¶ 58.

18 CFIT contends that the 2005 Agreements will destroy the back order service provider  
19 business by replacing the current lottery-like system with the CLS. *Id.* at ¶¶ 65, 68. Because  
20 "nothing in the contracts or otherwise will prevent VeriSign from further increasing prices,"  
21 consumers will pay more. *Id.* at ¶¶ 66-67. In addition, VeriSign intends to use its monopoly power  
22 over the .com and .net domain names to lock up the market for Web address directory assistance  
23 services. Under the current system, if a user enters domain name that is not registered, he receives a  
24 standard error page. *Id.* at ¶ 70. VeriSign's proposed SiteFinder service would "replace the standard  
25 error page with a customized VeriSign page that states that the desired page could not be found and  
26 offers some links to domain names with similar spellings." *Id.* at ¶ 71. For example, if a user types  
27 www.bokkstore.com, which is not registered, "the user will be directed to a VeriSign SiteFinder  
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1 page at www.bokkstore.com featuring such links as www.bookstore.com or www.bkstore.com." *Id.*  
2 VeriSign may be able to collect a Pay Per Click fee from the owners of these web sites. *Id.* Some  
3 registrants already purchase domain names that are misspellings of common web sites for the sole  
4 purpose of generating Pay Per Click revenue. *Id.* Because of VeriSign's unique position as the  
5 depository of all unregistered .com and .net domain names, only it will be able to receive revenue  
6 from this service and will drive out "some of those who are currently active in the Pay Per Click  
7 market." *Id.* at ¶ 72. In addition, because VeriSign has eliminated the five-day grace period for  
8 "returning" registered domain names, only VeriSign will be able to "test .com and .net domain  
9 names to see if they are suitable for use in the Pay Per Click market without paying a registry fee."  
10 *Id.* at ¶ 73. No one will be able to compete with VeriSign in this market because every other  
11 registrant will have to pay the non-refundable \$6 or \$4.25 registry fee to test traffic on such a  
12 domain name. *Id.* VeriSign has employed the SiteFinder service before, on September 15, 2003.  
13 *Id.* at ¶ 74. An ICANN advisory board determined that it "considerably weakened the stability of  
14 the Internet." *Id.* VeriSign abandoned the system only after ICANN threatened to take legal action.  
15 *Id.* at ¶ 75. However, VeriSign "announced that it would reintroduce SiteFinder at its discretion, and  
16 made clear that it had no intention of turning SiteFinder off for good." *Id.* Now, ICANN has agreed  
17 to permit VeriSign to launch SiteFinder "subject only to perfunctory procedural requirements." *Id.*  
18 at ¶ 76.

19 CFIT alleges causes of action against (1) VeriSign in the .com and .net Registration Markets  
20 for monopolization under section 2 of the Sherman Act, (2) VeriSign in the .com and .net  
21 Registration Markets for attempted monopolization under section 2 of the Sherman Act, (3)  
22 VeriSign in the Expiring Names Registration Services and Directory Assistance Services Markets  
23 for attempted monopolization under section 2 of the Sherman Act, (4) VeriSign and ICANN in "all  
24 relevant markets" for conspiracy to monopolize under section 2 of the Sherman Act, (5) VeriSign  
25 and ICANN in "all relevant markets" for conspiracy in restraint of trade under section 1 of the  
26 Sherman Act, (6) VeriSign and ICANN in "all relevant markets" for conspiracy in restraint of trade  
27 under the Cartwright Act, (7) VeriSign and ICANN for unfair competition under California Business  
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1 and Professions Code section 17200, (8) VeriSign for cybersquatting under 15 U.S.C. section  
 2 1125(d), and (9) VeriSign and ICANN for intentional interference with prospective economic  
 3 advantage. *Id.* at ¶¶ 79-147. CFIT seeks (1) a declaration that the 2005 .com Agreement is  
 4 unlawful, (2) a declaration that sections of the 2005 .net Agreement is unlawful, and (3) injunctive  
 5 relief.

## 6 II. ANALYSIS

### 7 A. Motion to Dismiss

8 Federal Rule of Civil Procedure 12(b)(3) permits a defendant to move to dismiss for  
 9 "improper venue."<sup>1</sup> Each registrar in the .com and .net TLDs must sign a Registry-Registrar  
 10 Agreement ("RRA") with VeriSign. Dahlquist Decl. Supp. Mot. Dism. ("Dahlquist Decl.") Ex. A.  
 11 The RRA states that "[a]ny legal action or other legal proceeding relating to this Agreement or the  
 12 enforcement of any provision of this Agreement shall be brought or otherwise commenced in any  
 13 state or federal court located in the eastern district of the Commonwealth of Virginia." *Id.* at § 6.7.  
 14 VeriSign argues that because CFIT purports to sue on behalf of registrars — who are subject to the  
 15 RRA — it is bound by this mandatory forum selection clause, making venue here improper.<sup>2</sup>  
 16 VeriSign contends that "[a]ll of the purported claims in the Complaint necessarily relate to the RRA,  
 17 because they are premised on alleged harm to CFIT's member registrars' ability to compete  
 18 effectively in the domain name registration business." Mot. Dism. at 5:22-24 (emphasis omitted).  
 19 VeriSign cites *Hill v. Pac. Gas. & Elec. Co.*, 1995 WL 86567 (N.D. Cal. 1995), *Bense v. Interstate*  
 20 *Battery Sys. of Am., Inc.*, 683 F.2d 718 (2d Cir. 1982), and *Rini Wine Co., Inc. v. Guild Wineries &*  
 21 *Distilleries*, 604 F. Supp. 1055 (E.D. Ohio 1985) for the proposition that "forum selection clauses

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 23  
 24 <sup>1</sup> VeriSign has answered CFIT's complaint. Although defendants generally must bring  
 25 Rule 12(b) motions before answering, VeriSign pled improper venue as an affirmative defense in its  
 26 answer, thus preserving its right to bring a Rule 12(b)(3) motion. *See Hopkinson v. Lotus*  
*Development Corp.*, 1995 WL 381888, \*5 (N.D. Cal. 1995) (rejecting argument that defendant  
 waived right to contest venue because it "timely raised the defense of improper venue in its . . .  
 Answer to Plaintiffs' Complaint").

27 <sup>2</sup> Federal common law applies to the validity and interpretation of forum selection  
 28 clauses. *See Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. 1988).



1 apply to non-contractual claims, including antitrust, intellectual property, unfair competition, and  
2 tortious interference[.]" Mot. Dism. at 10:10-12.

3 This argument is not convincing. The forum selection applies only to "legal proceeding[s]  
4 relating to this Agreement." The plain meaning of this language is that a lawsuit must involve the  
5 RRA itself to trigger the clause. Although VeriSign would have no relationship with CFIT's  
6 registrars absent the RRA, it is undisputed that CFIT's complaint and filings make no mention of the  
7 RRA. VeriSign's interpretation of "relating to" has no limiting principle: under it, all registrars must  
8 bring all causes of action against VeriSign in Virginia, no matter how attenuated the relationship  
9 between the claim and the RRA. This is not the law. *Cf. Gootnick v. Lighter*, 2005 WL 3079000 \*7  
10 (N.D. Cal. 2005) (denying motion to transfer venue based on forum selection clause in promissory  
11 note because, *inter alia*, "[i]t is unlikely that many legal issues in the claims asserted here will turn  
12 on legal interpretation of the note itself"). Indeed, each of VeriSign's authorities involved lawsuits  
13 that, in one manner or another, flowed from the contract containing the clause. *See Hill*, 1995 WL  
14 86567 at \*2 (applying forum selection clause to unfair competition and tort claims where plaintiff  
15 alleged that defendants breached the contract that contained the clause "with the intention of causing  
16 him emotional distress, and that their breaches were the result of fraud and unfair competition");  
17 *Bense*, 683 F.2d at 719 (applying forum selection clause to antitrust allegation that defendant had  
18 terminated the contract that contained the clause in retaliation for the plaintiff's refusal to participate  
19 in a price-fixing scheme); *Rini Wine*, 604 F. Supp. 1058-59 (applying forum selection clause to  
20 antitrust claims where "[t]he incident from which this dispute arises is indeed the termination of the

distributor agreement" that contained the clause).<sup>3</sup> The court thus denies VeriSign's motion to dismiss.<sup>4</sup>

## **B. Motions for Judgment on the Pleadings**

### **1. Legal Standard**

A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is a "means to challenge the sufficiency of the complaint after an answer has been filed." *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1115 (C.D. Cal. 2004). A motion for judgment on the pleadings is similar to a motion to dismiss. "For the purposes of the motion, the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false. Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a) requires complaints to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." "[A]ntitrust pleadings need not

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<sup>3</sup> VeriSign argues that "CFIT is clearly invoking the contract-based remedy of specific performance" because it "seeks to 'preserve the status quo in markets related to Internet domain names' by 'requiring VeriSign and ICANN to abide by the terms of the current .com [A]greement . . . until it expires.'" Rep. Supp. Mot. Dism. at 3:25-27 (emphasis omitted) (quoting Comp. ¶ 2). There are at least two problems with this contention. First, even if CFIT does request specific performance, it does so with respect to the 2001 .com Agreement, not the RRA. Second, the court cannot construe CFIT as seeking specific performance of the 2001 .com Agreement because it is not a party to that contract. *See Sheppard v. Banner Food Products*, 78 Cal. App. 2d 808, 812 (1947) ("Plaintiff has no right to enforce performance of the Bortz-Banner contract. He was not a party to it and it was not made specifically for his benefit.").

<sup>4</sup> During oral argument, VeriSign asked the court to deny the motion without prejudice. VeriSign claimed that CFIT will not be able to prove a necessary element of its substantive claims — antitrust injury — without implicating the RRA. "Antitrust injury" refers to the fact that only certain types of alleged harm sound in antitrust. *See, e.g., Glen Holly Entertainment, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1008 (9th Cir. 2003) (opining that "the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market") (internal quotation marks omitted). Even if the issue of whether CFIT's members are "consumers" or "competitors" arises, the court fails to perceive how the RRA will be relevant to this inquiry. Because the court can imagine no scenario causing the parties to dispute their rights and obligations under the RRA, it declines to permit VeriSign to renew its motion later.

1 contain great factual specificity" than other complaints. *Portland Retail Druggists Ass'n v. Kaiser*  
 2 *Found. Health Plan*, 662 F.2d 641, 648 (9th Cir. 1981). "However, the court is not required to  
 3 accept legal conclusions cast in the form of factual allegations if those conclusions cannot  
 4 reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752,  
 5 754-55 (9th Cir. 1994). "Nor is the court required to accept as true allegations that are merely  
 6 conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State*  
 7 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

## 8                   2.       Standing

9           VeriSign and ICANN argue that CFIT lacks standing. The standing requirement ensures that  
 10 federal courts hear only "cases" or "controversies" under Article III of the United States  
 11 Constitution. An association has "organizational standing" if it seeks to redress an injury that it  
 12 personally suffers. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299 n.11 (1979).  
 13 CFIT does not claim standing on this ground. An association may also invoke the doctrine of  
 14 "associational standing" to bring a complaint "on behalf of its members." *See New York State Club*  
 15 *Ass'n, Inc. v. City of New York*, 487 U.S. 1, 9 (1988). It may do if "(a) its members would otherwise  
 16 have standing to sue in their own right; (b) the interests it seeks to protect are germane to [its]  
 17 purpose; and (c) neither the claim asserted nor the relief requested requires the participation of  
 18 individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Com'n*, 432 U.S. 333, 343  
 19 (1977).<sup>5</sup> When a defendant moves to dismiss on standing grounds, the court must "accept as true all  
 20 material allegations of the complaint, and . . . construe [it] in favor of the complaining party."  
 21 *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988). At the same time, though, "[i]t is a long-settled  
 22 principle that standing cannot be inferred argumentatively from averments in the pleadings, but  
 23 rather must affirmatively appear in the record." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231  
 24 (1990) (plurality opinion) (internal citations and quotation marks omitted). Therefore, "[i]t is within  
 25 the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint

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26                   <sup>5</sup>       The requirement is not that all of the organization's members must have standing, but  
 27 that "at least one of its members would have standing to sue in his own right." *GrassRoots*  
 28 *Recycling Network, Inc. v. U.S. E.P.A.*, 429 F.3d 1109, 1111 (D.C. Cir. 2005).

1 or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing."  
 2 *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975).

3 The complaint fails to identify a single member of CFIT. *See* Comp. ¶ 7 (alleging only that  
 4 "[m]embers of CFIT include certain domain name registrars, registrants, back order service  
 5 providers, and other Internet stakeholders"). At least two cases suggest that this is fatal to CFIT's  
 6 attempt to plead associational standing. First, in *American Immigration Lawyers Ass'n v. Reno*, 18  
 7 F. Supp. 2d 38 (D. D.C. 1998) several organizations challenged the Illegal Immigration Reform and  
 8 Immigrant Responsibility Act of 1996, which worked a sea change in adjudicating the claims of  
 9 aliens who arrive in the United States without proper documentation. The plaintiffs included  
 10 refugee assistance associations and coalitions of immigration lawyers. They contended that the  
 11 statute would harm their members by, *inter alia*, causing the erroneous removal of some immigrants.  
 12 *Id.* at 49-50. The D.C. Circuit held that plaintiffs failed to allege a legally-cognizable injury-in-fact  
 13 because they did not pinpoint a specific individual who was likely to be deported:

14 Organizations are obligated to allege facts sufficient to establish that one or more  
 15 of [their] members has suffered, or is threatened with, an injury. *This obligation*  
 16 *extends to identifying the member or members of plaintiff organizations that have,*  
 17 *or will suffer, harm.* Here, plaintiffs either generally allege harm to all members  
 18 of all organizations or identify only vague categories of members that might  
 19 suffer harm. *They can point to no identifiable member or members for which the*  
 20 *Court can evaluate the harm.* Nowhere in their pleadings do the plaintiffs  
 21 identify one injured person by name, allege that the injured person is a member of  
 22 one of the plaintiff organizations (naming the specific organization), or allege  
 23 facts sufficient to establish the harm to that member.

24 *Id.* at 51 (emphasis added) (internal citations and quotation marks omitted).

25 Similarly, in *Maine Ass'n of Indep. Neighborhoods Comm'r v. Maine Dep't of Human Servs.*,  
 26 747 F. Supp. 88 (D. Me. 1990), M.A.I.N., an organization, sought to strike down the "voluntarily  
 27 quit rule," a regulation that terminated food stamp assistance for "heads of household" when the  
 28 family's primary wage earner stopped working without good cause. M.A.I.N.'s complaint alleged  
 that it "has members who are the head of a Food Stamp household but are not the primary wage  
 earners[.]" *Id.* at 90. Defendants moved to dismiss on standing grounds. M.A.I.N.'s president  
 submitted an affidavit stating that "M.A.I.N. has at least one member who is a food stamp 'head of a  
 household,' is not the primary wage earner and who recently lost food stamps for the household

1 when the primary wage earner quit work without good cause." *Id.* at 91. The court granted  
2 defendants' motion, explaining that the complaint and the affidavit "do[ ] not identify the member  
3 allegedly affected by the voluntary quit rule, nor . . . identify any of the factual circumstances  
4 supporting her claim to be subject to the regulation." *Id.* at 92.

5 Like the defective complaints in *American Immigration Lawyers Ass'n* and *Maine Ass'n of*  
6 *Indep. Neighborhoods*, which alleged "only vague categories of members that might suffer harm"  
7 and "d[id] not identify the member allegedly affected," CFIT's complaint contains a single cryptic  
8 sentence about its members' identities. This is insufficient. Regardless of whether there is a bright-  
9 line rule mandating that organizations name at least one member in order to satisfy *Hunt's* first  
10 factor, at the very least *American Immigration Lawyers Ass'n* and *Maine Ass'n of Indep.*  
11 *Neighborhoods* illuminate that courts may insist on such specificity. This makes sense. Although  
12 Federal Rule of Civil Procedure 8(a)(2) only requires complaints to "give the defendant fair notice  
13 of what the plaintiff's claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41,  
14 47 (1957), "fair notice" entitles defendants to some idea about who is seeking to haul them into  
15 court. Two additional considerations warrant such disclosure here. For one, this is an antitrust  
16 lawsuit. Such cases are notoriously costly and protracted. *See, e.g., DM Research, Inc. v. College of*  
17 *Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (in antitrust litigation, "the price of entry, even to  
18 discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further  
19 proceedings"). In addition, defendants have faced similar claims before. In 2004, several plaintiffs,  
20 including R. Lee Chambers Company LLC, filed antitrust and state law claims against ICANN and  
21 VeriSign in the Central District of California. *See* ICANN's Request for Judicial Notice Ex. I at 2.  
22 The court dismissed the antitrust claims and remanded the state law claims. *See id.* When CFIT  
23 filed its TRO in this court, it included a declaration from Richard L. Chambers. *See* Docket No. 6.  
24 If this case involves res judicata or collateral estoppel issues — and the court expresses no view on  
25 whether it does — defendants deserve to find out as early as possible.

26 CFIT relies on *Clark v. McDonald's Corp.*, 213 F.R.D. 198 (D. N.J. 2003). In that case,  
27 Robert Clark, a paraplegic, and Access Today, an organization to which Clark belonged, brought a  
28

1 class action, claiming that "architectural barriers" at McDonald's restaurants violated Title III of the  
 2 Americans with Disabilities Act ("ADA"). The complaint alleged that "at least one member" of  
 3 Access Today had visited McDonald's franchises which Clark had not. *Id.* at 203. McDonald's  
 4 contested both Clark and Access Today's standing on a motion to dismiss. The court first concluded  
 5 that, at a minimum, Clark had standing to assert claims for injunctive relief at restaurants he had  
 6 visited before filing the complaint. *Id.* at 227-31.<sup>6</sup> In addition, the court reasoned, Clark's Access  
 7 Today membership satisfied *Hunt*'s first prong and conferred associational standing upon the  
 8 organization. *Id.* at 214. Noting that Clark's standing was limited to obtaining equitable relief at  
 9 only certain restaurants, McDonald's then argued that the court should concomitantly restrict Access  
 10 Today's standing:

11 Access Today cannot advance the claims of its unidentified members, say the  
 12 Defendants, because the amended complaint does not 'identify [such members],  
 13 allege which [members] have which disabilities, allege which [members] with which  
 disabilities visited which store on which dates, identify what discriminatory conduct  
 was encountered, [and] which stores each unnamed member plans to visit (if any).'

14 *Id.* at 215 (alteration in original). The court rejected this contention, calling it an "exaggerated  
 15 pleading standard." *Id.* (internal quotation marks omitted).

16 *Clark* is distinguishable. For one, unlike CFIT, whose membership remains shrouded in  
 17 mystery, Access Today did identify at least one member: Clark. *See id.* ("[t]he short answer to  
 18 Defendants' present challenge, therefore, is that Clark's standing, albeit limited, enables Access  
 19 Today to satisfy the first prong of the *Hunt* test"). Moreover, *Clark* did not reject the same  
 20 arguments defendants make here. Instead, that court found unpersuasive McDonald's novel theory  
 21 that Clark's standing shaped the contours of other Access Today members' standing. *See id.*  
 22 (describing McDonald as contending that Access Today's standing should be "limited so as to be  
 23 coextensive with the standing Clark enjoys"). Accordingly, the court grants defendants' motions for  
 24 judgment on the pleadings without prejudice.

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27 <sup>6</sup> The court reserved ruling on whether Clark could challenge obstructions in  
 28 restaurants he had not visited. *See Clark*, 213 F.R.D. at 229-30.



### 3. Antitrust Claims

Despite the fact that the court has dismissed CFIT's claims, it may be helpful at this point to clarify several other pleading issues.

#### a. Failure to Allege Relevant Product Markets

In general, a plaintiff must allege a relevant product and geographic market to state a claim under sections 1 and 2 of the Sherman Act. A market consists of all "commodities reasonably interchangeable by consumers for the same purposes[.]" *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). "In economists' terms, two products or services are reasonably interchangeable where there is sufficient cross-elasticity of demand. Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product." *Todd v. Exxon Corp.*, 275 F.3d 191, 201-02 (2d Cir. 2001). "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962).

One market that CFIT alleges is the "[t]he market for services used by end users in the purchase and sale of expiring domain name registrations ('the Expiring Names Registration Services Market')." Comp. ¶ 11. VeriSign argues that *Weber v. Nat'l Football League*, 112 F. Supp. 2d 667 (N.D. Ohio 2000) and *Smith v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159 (N.D. Ala. 2001) have rejected this market definition as a matter of law.

In *Weber*, a professional domain name dealer registered "jets.com" and "dolphins.com" with Network Solutions Incorporated ("NSI"), VeriSign's predecessor. The National Football League attempted to get NSI to transfer the domain names to the New York Jets and the Miami Dolphins. NSI placed the names on hold and barred the plaintiff from selling them. The plaintiff sued under section 2 of the Sherman Act, describing the relevant product markets as "the demand for the domain names 'jets.com' and 'dolphins.com.'" *Weber*, 112 F. Supp. 2d at 673. The court rejected these definitions, reasoning that the infinite number of potential domain names made the proper market "domain names in general":

The football defendants argue that the market should not be defined in terms of their specific marks, but rather in terms of domain names in general . . . . The logic of the



1 football defendants' argument is sound . . . . Although domain names are not a  
2 traditional commodity, for the purposes of a monopolization claim under the  
3 Sherman Act, the examination of the relevant market should be the same. In this  
case, the market is defined in terms of domain names in general, not 'jets.com' and  
'dolphins.com.'

4 *Id.* at 673-74. Because the plaintiff did not allege that the defendants had monopolized this broader  
5 market, the court dismissed his claim. *Id.* at 674.

6 In *Smith*, a computer programmer sued NSI under the Sherman Act for refusing to permit  
7 him to try to acquire expired domain names. He defined the relevant product market as "expired  
8 domain names." *Smith*, 135 F. Supp. 2d at 1168. Relying on *Weber*, the court reasoned that  
9 plaintiff's failure to prove that NSI monopolized the market for "domain names generally" doomed  
10 his claim:

11 [T]here is no inherent difference in character, for purposes of interchangeability and  
12 cross-elasticity of demand, between domain names that are 'expired' and held by NSI  
and those that are not. It is true in a literal sense that each domain name is unique.  
13 And one given individual domain name may be far more valuable on the open market  
than others. But products need not be entirely fungible to be considered part of the  
14 same relevant market . . . . [T]he *Weber* court did more than decide that the two  
names did not constitute the relevant market; the court reasoned that the relevant  
15 market was all domain names generally as a result of cross-elasticity of demand.  
Because the number of domain names, unlike traditional commodities, is essentially  
16 unlimited, there will always be reasonable substitute names available for any given  
name kept out of circulation, whether by a registrar or by the registrant, regardless  
17 of whether we are talking about two names or a hundred and sixty thousand.

18 *Id.* at 1169-70. Thus, the court granted summary judgment in NSI's favor. *Id.* at 1170.

19 *Weber* and *Smith* provide an additional bar to CFIT's Sherman Act claims with respect to the  
20 Expiring Names Registration Services Market. Although CFIT alleges that "[r]ecognizable (and  
21 hence usable) domain names are in limited supply" and "often have substantial commercial value,"  
22 comp. ¶ 25, 64, no facts support these conclusory statements. Nevertheless, the court declines  
23 VeriSign's invitation to hold that CFIT's market definition necessarily fails as a matter of law. At  
24 bottom, both *Weber* and *Smith* rest on an empirical premise: that all domain names are fungible.  
25 CFIT may have a colorable argument that this fact-specific issue is not amenable to a pleadings-

1 based challenge. Indeed, unlike this court, *Smith* had the benefit of an evidentiary record.<sup>7</sup>  
 2 Although it may be unlikely, it is theoretically possible that CFIT's amended complaint may contain  
 3 detailed allegations tending to show that registered and unregistered domain names are not  
 4 reasonably interchangeable.<sup>8</sup> A domain name cannot expire without first being registered; arguably,  
 5 the fact that some individual or entity has registered a domain name implies that it has a value that  
 6 an unregistered name does not. VeriSign contends that bare allegations that some domain names  
 7 sell for high prices "is not at odds with . . . *Smith*," because it "acknowledged that 'one given  
 8 individual domain name may be far more valuable than others,' but 'products need not be entirely  
 9 fungible to be considered part of the same relevant market.'" Rep. Supp. Mot. Jud. Plead. at 10:12-  
 10 15 (quoting *Smith*, 135 F. Supp. 2d at 1169). At the same time, however, price disparities are  
 11 relevant for grouping commodities into relevant markets, see *E.I. du Pont de Nemours & Co.*, 351  
 12 U.S. at 404, and CFIT's new allegations could potentially differentiate the alleged Expiring Names  
 13 Registration Services Market from domain names in general. The court thus dismisses this claim  
 14 with leave to amend.

### 15 3. Business and Professions Code Section 17200

16 CFIT brings claims under California Business and Professions Code section 17200 ("UCL").  
 17 Compl. ¶¶ 129-33. The UCL prohibits unfair competition, including "any unlawful, unfair or  
 18 fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Until recently, "any person  
 19 acting for the interests of itself, its members, or the general public" could sue under the UCL.  
 20 *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1011 n.3 (2005). The term  
 21 "person" includes associations. See Cal. Bus. & Prof. Code § 17201 ("[a]s used in this chapter, the  
 22

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23 <sup>7</sup> For example, the court bolstered its key determination that adequate alternative  
 24 domain names are always available by noting that "while the number of 'expired' names in NSI's  
 25 database is undisputedly substantial in a raw sense, it represents approximately .05% of all domain  
 names under registration." *Smith*, 135 F. Supp. 2d at 1170.

26 <sup>8</sup> Before the hearing on this matter, CFIT filed an amended complaint as an exhibit to a  
 27 request for leave to amend. The court expresses no view whatsoever on this complaint's legal  
 28 sufficiency. In addition, pursuant to CFIT's request at oral argument, the court will not deem this  
 proposed amended complaint controlling. CFIT deserves an opportunity to amend after receiving  
 this order and attending oral argument.

term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations"). In November 2004, California voters approved Proposition 64, which curtails private representative actions under the UCL. The statute no longer contains language about "any person acting for the interests of . . . its members" and now bestows standing only on "any person who has suffered injury in fact and has lost money or property . . . ." Cal. Bus. & Prof. Code § 17204. In addition, Proposition 64 amended section 17203, which authorizes injunctive relief, to provide that "[a]ny person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of [s]ection 17204 and complies with [s]ection 382 of the Code of Civil Procedure." Cal. Bus. & Prof. Code § 17203.<sup>9</sup> Defendants contend that Proposition 64 abolished associational standing under the UCL.

The California Supreme Court has explained that a court construing a statute must start with its plain meaning and only examine extrinsic sources if necessary to resolve an ambiguity:

[W]e first examine the words of the respective statutes: 'If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs. Where the statute is clear, courts will not interpret away clear language in favor of an ambiguity that does not exist.' If, however, the terms of a statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history.

*People v. Coronado*, 12 Cal. 4th 145, 151 (1995) (quoting *Lennane v. Franchise Tax Bd.*, 9 Cal. 4th 263, 268 (1994)). At the same time, however, a court may disregard "[t]he literal meaning of the words of a statute . . . to avoid absurd results . . . ." *County of Sacramento v. Hickman*, 66 Cal. 2d 841, 849, n.6 (1967).

CFIT argues that Proposition 64 could not have eliminated associational standing under the UCL because the explanation of the initiative that voters approved was comparatively narrow, stating only that "[i]t is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." Cal. Bus. & Prof. Code §

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<sup>9</sup> California Code of Civil Procedure section 382 sets forth requirements for class actions.

1 17203 (Historical and Statutory Notes). But the statute's plain language effects a broader change.  
2 CFIT cannot explain why Proposition 64 removed the section giving standing to "any person acting  
3 for the interests of . . . its members" and replaced it with language requiring a plaintiff *personally* to  
4 have suffered "injury in fact" and "lost money or property." Cal. Bus.& Prof. Code § 17204.  
5 "[M]aterial changes in the phraseology of statutes normally demonstrate an intent by the lawmakers  
6 to change the meaning." *Barrett v. Dawson*, 61 Cal. App. 4th 1048, 1053 (1998) (holding that the  
7 Legislature's deletion of words "entered into on or after the effective date of this section" from  
8 statute forbidding restrictive covenants meant that all restrictive covenants, whenever formed, were  
9 void). The fact that the UCL now expressly limits "representative claims or relief on behalf of  
10 others" to certain forms of class actions also belies CFIT's argument. *See* Cal. Bus. & Prof. Code §  
11 17203.<sup>10</sup> Associational standing is a "representative claim": the organizational plaintiff has no claim  
12 itself. *See Warth*, 422 U.S. at 511 (referring to associational standing as "representational  
13 standing"). Therefore, because the UCL no longer permits associational standing, and because CFIT  
14 does not claim to have any other form of standing, the court dismisses its UCL cause of action  
15 without leave to amend.

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24 <sup>10</sup> In *Bank of America, N.A. v. Miller*, 2005 WL 2086099 (E. D. Cal. 2005), the  
25 plaintiff, Miller, founded Consumers Against Unfair Business Practices ("CAUBP"). CAUBP sued  
26 Bank of America under the UCL. In light of Proposition 64, however, CAUBP conceded that it was  
27 an improper plaintiff because "the organization itself has no account with the Bank and therefore  
28 cannot claim to have suffered an injury in fact." *Id.* at \*1. CFIT correctly notes that CAUBP's  
concession means that the court did not actually adjudicate the issue. Although this is true in a  
legalistic sense, CAUBP's concession also reinforces this court's sense that the plain meaning of the  
UCL as amended does not permit associational standing.

**III. ORDER**

For the foregoing reasons, the court

(1) denies VeriSign's motion to dismiss,

(2) grants defendants' motion for judgment on the pleadings with ten days leave to amend except for CFIT's UCL claim,

(3) grants defendants' motions for judgment on the pleadings on CFIT's UCL claim with prejudice,

(4) vacates the March 24 hearing date on CFIT's motion for leave to file an amended complaint, and

(5) permits defendants twenty days from CFIT's amendment to file a response.

DATED: 2/28/06

/s/ Ronald M. Whyte  
RONALD M. WHYTE  
United States District Judge

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